Tetuan Tanjung Teras Sdn Bhd & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–43 OF 2001
LOW HOP BING J
2 JULY 2003

Civil Procedure *— Appeal — Admission of fresh evidence — Whether affidavit in support contained facts and circumstances within established principles — Whether requirements for purposes of obtaining leave to adduce fresh evidence fulfilled — Rules of the High Court 1980 O 55 r 5A(a) and (b), Subordinate Courts Rules 1980 O 50 r 6(4)(a) and (b)*

Civil Procedure *— Pleadings — Amendment — Delay in application to amend — Tactical manoeuvre amounted to abuse of process of court — Whether application for amendment allowed — Principles governing amendment of pleadings — Rules of the High Court 1980 O 20 r 5(1)*

Civil Procedure *— Pleadings — Extension of time — Burden on defendants to show extension of time did not cause any real risk of prejudice to his opponent — Whether defendants have affirmed sufficient affidavit evidence to support and sustain their application*

The appellants ('the defendants') filed a summons in chambers for an order that they be given leave to file additional affidavit out of time; and to raise new issues and adduce fresh evidence for the purpose of setting aside the summary judgment given by the sessions court judge against them. The issues to be determined were: (i) whether the defendants have affirmed sufficient affidavit evidence to support and sustain their application; (ii) whether the defendants' application for amendment was allowed by virtue of O 20 r 5(1) of the Rules of the High Court 1980; and (iii) whether the defendants' had fulfilled the requirements for the purposes of obtaining leave to adduce fresh evidence.

Held, dismissing the defendants' application with costs:

(1) The burden was on the defendants to show that the extension of time did not cause any real risk of prejudice to his opponent, for which an award of costs could not compensate. In order to enable the court to give a proper consideration, an application for extension of time must be supported by affidavit evidence. The defendants' affidavit demonstrated a total lack of facts and circumstances causing the delay and the reason for such delay. On the contrary, there was an exhibition of lackadaisical approach and attitude in the affidavit amounting to a lacklustre position taken by the defendants' legal advisers, there being no evidence in the defendants' affidavit to support their application to file an affidavit out of time (see p 470D–G); *Asia Commercial Finance*

(M) Bhd v Pasadena Properties Development Sdn Bhd & Ors [1991] 1 MLJ 111 followed. A

(2) The defendants' application was made at the appeal stage after the sessions court judge had arrived at a decision. It seemed that this was a tactical manouevre amounting to an abuse of the process of the court and should be disallowed. Furthermore, there was an undue or inordinate delay of some 21 months on the part of the defendants, whose bona fides had thereby been negated. Their affidavit in support of the application also contained no explanation whatsoever for such delay. The defendants had every opportunity to plead all the defences available to them in the sessions court but had not done so. The purported application for leave to amend was a delayed rescue operation and was an attempt to have a second bite at the proverbial cherry, thereby turning the defence from one character to a defence of another and inconsistent character (see p 471C–E, H–I); *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348 followed. B C D

(3) In applying for leave to adduce fresh evidence, the High Court in hearing the appeal has the power to admit fresh evidence, so long as the requirements of O 55 r 5A(a) and (b) of the Rules of the High Court 1980 (O 50 r 6(4)(a) and (b) of the Subordinate Courts Rules 1980) have been fulfilled. The defendants' affidavit in support did not contain any averment of facts and circumstances which would come within the established principles. Therefore, the court was not satisfied that the principles had been fulfilled (see p 472C–D, F–G); *Norfaiz Azli bin Muhammad v Abdullah bin Yaman* [2001] 4 MLJU 1 distinguished. E F

[Bahasa Malaysia summary

Perayu-perayu ('defendan-defendan') telah memfailkan satu saman dalam kmaar untuk satu perintah agar mereka diberikan kebenaran untuk memfailkan afidavit tambahan di luar had masa; an untuk menimbulkan persoalan-persoalan baru dan mengemukakan keterangan baru bagi tujuan mengenepikan penghakiman terus yang diberikan oleh hakim mahkamah sesyen terhadap mereka. Persoalan-persoalan yang perlu ditentuklan adalah: (i) sama ada defendan-defendan mempunyai pengesahan afidavit keterangan yang mencukupi untuk menyokong dan mengekalkan permohonan mereka; (ii) sama ada permohonan untuk pindaan defendan-defendan dibuat dengan betul tanpa apa-apa kelewatan yang tak wajar atau melampau; dan (iii) sama ada defendan-defendan telah memenuhi keperluan-keperluan bagi tujuan mendapatkan kebenaran mengemukakan keterangan baru. G H I

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Beban terletak ke atas defendan-defendan untuk menunjukkan bahawa lanjutan masa tidak menyebabkan apa-apa risiko prejudis sebenar terhadap pembangkangnya, di mana satu award untuk kos tidak boleh diberikan. Bagi membolehkan mahkamah memberikan pertimbangan yang betul, satu permohonan untuk lanjutan masa perlu disokong oleh keterangan afidavit. Afidavit defendan-defendan menunjukkan kekurangan fakta dan keadaan yang menyebabkan kelewatan dan sebab kelewatan tersebut. Sebaliknya, dapat dilihat pendekatan dan sikap acuh tak acuh dalam afidavit tersebut yang menunjukkan pendirian membosankan yang diambil oleh penasihat undang-undang defendan-defendan, di mana tidak terdapat keterangan dalam afidavit defendan-defendan untuk menyokong permohonan mereka untuk memfailkan satu afidavit di luar masa (lihat ms 470D–G); *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111 diikut.

(2) Permohonan defendan-defendan telah dibuat di peringkat rayuan selepas hakim mahkamah sesyen tiba kepada satu keputusan. Ia kelihatan seperti satu tindakan taktikal yang merupakan satu penyalahgunaan proses mahkamah dan tidak sepatutnya dibenarkan. Tambahan pula, wujud kelewatan yang tak wajar dan melampau selama 21 bulan di pihak defendan-defendan, yang mana bona fide mereka disangkal. Afidavit sokongan terhadap permohonan mereka juga tidak mengandungi apa-apa penjelasan untuk kelewatan tersebut. Defendan-defendan telah diberikan peluang secukupnya untuk memplidkan semua pembelaan yang ada untuk mereka di mahkamah sesyen tetapi tidak berbuat demikian. Permohonan bagi tujuan mendapat kebenaran meminda adalah satu operasi penyelamat yang terlewat dan adalah satu percubaan untuk kali kedua, di mana menjadikan pembelaan dari satu ciri kepada satu pembelaan yang lain dan bersifat tidak konsisten (lihat ms 471C–E, H–I); *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348 diikut.

(3) Dalam memohon kebenaran untuk mengemukakan keterangan baru, Mahkamah Tinggi dalam mendengar rayuan mempunyai kuasa untuk memasukkan keterangan baru tersebut, selagi keperluan-keperluan A 55 k 5A(a) dan (b) Kaedah-Kaedah Mahkamah Tinggi 1980 (A 50 k 6(4)(a) dan (b) Kaedah-Kaedah Mahkamah Rendanh 1980) telah dipenuhi. Afidavit sokongan defendan-defendan tidak mengandungi apa-apa penegasan fakta-fakta atau keadaan-keadaan yang terangkum di bawah prinsip-prinsip tersebut. Oleh itu, mahkamah tidak berpuas hati bahawa prinsip-prinsip tersebut telah dipenuhi (lihat ms 472C–D, F–G); *Norfaiz Azli bin Muhammad v Abdullah bin Yaman* [2001] 4 MLJU 1 dibeza.]

Notes

For cases on the admission of fresh evidence, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 551–552.

For cases on the amendment of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4386–4395.

For cases on extension of time, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4541.

Cases referred to

Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors [1991] 1 MLJ 111 (folld)

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369 (refd)

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348 (folld)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Ladd v Marshall [1954] 1 WLR 1489 (refd)

Lim Hee Chuan v Toh Phaik Har (f) [1949] MLJ 92 (refd)

Lam Soon Cannery & Co v Hooper & Co [1965] 2 MLJ 148 (refd)

Lau Foo Sun v The Government of Malaysia [1970] 2 MLJ 70 (refd)

Norfaiz Azli bin Muhammad v Abdullah bin Yaman [2001] 4 MLJU 1 (distd)

Shedden v Patrick [1869] LR 1 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 125

Contracts Act 1950 s 24

Courts of Judicature Act 1964 ss 29, 69(3)

Rules of the High Court 1980 O 3 r 5, O 20 r 1(1), O 55 r 5A(a), (b)

Subordinate Courts Rules 1980 O 26A, O 15 r 1(1), O 50 r 6(4)(a), (b)

Lawrence Teh (*Lawrence Teh & Co*) for the defendants.

Sheron Lee (*Moi, NK Koh & Chee*) for the plaintiff.

Low Hop Bing J:

Application

This application demonstrates how important it is to have a strong foundation and knowledge in the basic rules of civil procedure in order to be placed on the right track in handling litigation for parties in court.

A Before me is the summons in chambers, in encl (16), filed by the appellants ('the defendants') for an order that the defendants be given leave:

(1) to file additional affidavit out of time; and

(2) to raise new issues and adduce fresh evidence for the purpose of setting aside the summary judgment given by the learned sessions
B court judge Melaka under O 26A of the Subordinate Courts Rules 1980 against them on 23 July 2001 ('the summary judgment')

At the hearing of the aforesaid application, the defendants also made an oral application for leave to amend their defence.

C *Grounds of application*

The defendants' ground in support of prayer (1) above is that on 7 March 2003, they retained the services of their new solicitors viz Tetuan Lawrence Teh and Co ('new solicitors') who were of the view that the defendants have a strong case to set aside the summary judgment as there were disputes of
D law and facts, and that the facts were prejudicial to the defendants.

Prayer (2) sought by the defendants is premised on the basis that the new solicitors believe they could raise a new issue that the respondent ('the plaintiff') has given a contract of 'building credit business' to the defendants in contravention of the Banking and Financial Institutions Act 1989 ('BAFIA') and hence void in law.
E

I am unable to identify any ground in support of the defendants' oral application for leave to amend the defence.

Facts of the case

F The defendants' affidavit in support, apart from referring to the summary judgment in the sum of RM43,286.35 as at 30 October 1999, and costs against them, restated the above grounds of application, adding that there were triable issues on points of law.

Submission for defendants

G

Mr Lawrence Teh, learned counsel for the defendants, submitted that the triable issues on points of law were based on the illegality of contract contravening s 125 of BAFIA read with s 24 of the Contracts Act 1950 and he relied on *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369 (SC).

H

Contention for plaintiff

Miss Sheron Lee, learned counsel for the plaintiff, argued that the defendants have failed to fulfil the requirements in *Ladd v Marshall* [1954] 1 WLR 1489 (CA), for the purposes of obtaining leave to adduce fresh
I evidence.

She added that parties are bound by their own pleadings as was held in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196.

It was stressed for the plaintiff that the defendants have departed from their defence.

Decision of the court

Filing affidavit out of time

Order 3 r 5 of the Rules of the High Court 1980 (O 3 r 5 of the Subordinate Courts Rules 1980) confers upon the court the discretion to extend or abridge any period within which a person is required or authorized by these rules or by any judgment, order or direction to do any act in any proceedings.

This discretion being a judicial discretion has to be exercised properly, ie according to established judicial principles having regard to all the facts and circumstances of each individual case, but not, eg in the same manner as day following night.

The burden is on the applicants, ie the defendants herein to show that the extension of time does not cause any real risk of prejudice to his opponent, ie the plaintiff, for which an award of costs cannot compensate: *Malaysian High Court Practice 1998 Desk Edition* 1 MLJ p 32 para 3.5.1 and the cases cited therein.

In order to enable the court to give a proper consideration, an application for extension of time must be supported by affidavit evidence: *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111 at p 116 per Zakaria Yatim J (later FCJ).

The question before me is whether the defendants have affirmed sufficient affidavit evidence to support and sustain their application. A careful and proper perusal of the defendants' affidavit demonstrated a total lack of facts and circumstances causing the delay and the reason for such delay. On the contrary, there is an exhibition of lackadaisical approach and attitude in the affidavit amounting to a lacklustre position taken by the defendants' legal advisers, there being no evidence in the defendants' affidavit to support their application to file an affidavit out of time.

Raising new issues

The matter before the sessions court has been decided on the basis of pleadings and affidavits together with the exhibits annexed thereto which the parties have filed for consideration by the court.

It is basic that parties are bound by their own pleadings, see eg *Janagi.*

In order to raise new issues which were outside the defendants' defence, it is incumbent upon the defendants to amend the defence, for which the defendants must apply for leave under O 20 r 1(1) of the Rules of the High Court 1980 (or O 15 r 1(1) of the Subordinate Courts Rules 1980) and such leave for amendment would generally be allowed as would cause no injustice to the opponent, ie the plaintiff: *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348.

A The governing principles are as follows:

(a) there is bona fides on the part of the applicant;

(b) the amendments cause no prejudice to the other side which cannot be compensated by costs; and

B (c) they are not such as to turn a suit of one character into a suit of another and inconsistent character.

(see eg *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (SC)).

The stage at which the application for amendment is to be made is in C the court of first instance and even in that case, the application must be made without any undue or inordinate delay.

The defendants' application herein is made at the appeal stage after the learned sessions court judge has arrived at a decision upon consideration of all the pleadings, affidavits and exhibits before him. It seems to me that this is a tactical manouevre amounting to an abuse of the process of the court D and should be disallowed: *Ismail bin Ibrahim.*

In addition, this application was made on 14 April 2003 when the decision of the sessions court was delivered on 23 July 2001, thereby occasioning an undue or inordinate delay of some 21 months on the part of the defendants, whose bona fides had thereby been negated.

E Again, the defendants' affidavit in support of this application contained no explanation whatsoever for such delay.

Despite the aforesaid shortcomings, I shall adopt a magnanimous and liberal approach and proceed to consider the merits of the defendants' application.

F The plaintiff's claim against the first defendant is for the sale and delivery of building materials to the first defendant pursuant to a credit agreement, and against the second, third and fourth defendants as guarantors.

The defendants' defence filed in the sessions court pleaded in para 5 G thereof that the defendants denied the credit agreement between the first defendant and the plaintiff and that even if the credit agreement existed, it was void for uncertainty. There seems to be no serious denial of the building materials sold and delivered to the first defendant who appeared to have also made payments thereon from time to time, leaving a balance which became the said judgment sum.

H The new issues sought to be raised for the defendants include the defence of illegality under s 125 of BAFIA and s 24 of the Contracts Act 1950.

The defendants have had every opportunity to plead all the defences available to them in the sessions court but have not done so. The purported I application for leave to amend is a delayed rescue operation and is an attempt to have a second bite at the proverbial cherry, thereby turning the defence from one character to a defence of another and inconsistent character.

If there is an illustration of an afterthought, this purported defence of illegality would aptly fit the description.

In *Coramas*, which was cited for the defendants, except for s 125 of BAFIA, the facts do not show any similarity at all as that case dealt with the sale and purchase of shares and a host of other corporate matters. The clear-cut dissimilarity of facts would attract the application of an entirely different set of law. The short answer to the defendants' reliance on this case is that it is completely out of focus.

Adducing fresh evidence

In applying for leave to adduce fresh evidence, one must not lose sight of the established principles governing the grant of leave in this respect.

Section 29 of the Courts of Judicature Act 1964 read with s 69(3) thereof and O 55 r 5A(a) and (b) of the Rules of the High Court 1980 (O 50 r 6(4)(a) and (b) of the Subordinate Courts Rules 1980), this court in hearing an appeal has the power to admit fresh evidence, so long as the following requirements of the said O 55 r 5A(a) and (b) (the said O 50 r 6(4)(a) and (b)) have been fulfilled:

(a) at the hearing in the subordinate court, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the subordinate court.

This 'fresh evidence' rule has also been expounded earlier by our courts in *Lim Hee Chuan v Toh Phaik Har (f)* [1949] MLJ 92; *Lam Soon Cannery & Co v Hooper & Co* [1965] 2 MLJ 148 (FC); and *Lau Foo Sun v The Government of Malaysia* [1970] 2 MLJ 70 (FC), following *Ladd v Marshall*; and *Shedden v Patrick* [1869] LR 1 HC, SC 470.

The defendants' affidavit in support does not contain any averment of facts and circumstances which would come within the above established principles. Therefore, I am not satisfied that the aforesaid principles have been fulfilled. The case of *Norfaiz Azli bin Muhammad v Abdullah bin Yaman* [2001] 4 MLJU 1 (HC) cited for the defendants, is distinguishable as the applicant there has fulfilled the governing principles.

Conclusion

The foregoing grounds provide the answer to the defendants' application, ie it is devoid of merits and is hereby dismissed with costs.

Defendants' application dismissed with costs.

Reported by Ezatul Zuria Azhari